(3)

Supreme Court, U.S.
FILED
JUN - 5 2000
CLERK

No. 99-1504

IN THE

Supreme Court of the United States

ELLIS E. NEDER, JR., PETITIONER,

v.

UNITED STATES, RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

NOEL G. LAWRENCE
Law Offices of
Noel G. Lawrence, P.A.
100 Riverside Avenue
Jacksonville, Florida 32202
(904) 733-1237

JAVIER H. RUBINSTEIN
Counsel of Record
KASPAR J. STOFFELMAYR
THOMAS B. NACHBAR
KARNIG KERKONIAN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE SPLIT OF AUTHORITY REGARDING THE APPLICABILITY OF THIS COURT'S DECISION IN *YATES* TO HARMLESS-ERROR REVIEW. 1

II. THE COURT SHOULD GRANT THE PETITION IN ORDER TO ELIMINATE THE SPLIT AMONG THE CIRCUITS OVER THE MEANING OF MATERIALITY IN THE FEDERAL LAW OF FRAUD. 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) 8, 9

Carmell v. *Texas*, 120 S. Ct. 1620 (2000) 5

Chapman v. *California*, 386 U.S. 18 (1967) 2, 3

Griffin v. *United States*, 502 U.S. 46 (1991) 2

Keating v. *United States*, 191 F.3d 1053 (9th Cir. 1999) 2, 3

Kungys v. *United States*, 485 U.S. 759 (1988) 7, 8, 9

Neder v. *United States*, 527 U.S. 1 (1999) ..... *passim*

Sibron v. *New York*, 392 U.S. 40 (1968) 5

United States v. *Corsino*, 812 F.2d 26 (1st Cir. 1987) ... 10

United States v. *Goldfine*, 538 F.2d 815 (9th Cir. 1976) .. 9

United States v. *Hastings*, 134 F.3d 235 (4th Cir.), *cert. denied*, 523 U.S. 1143 (1998) 3

United States v. *Ienco*, 92 F.3d 564 (7th Cir. 1996) 3

United States v. *Neder*, 136 F.3d 1459 (11th Cir. 1998), *aff'd in part and rev'd in part*, 527 U.S. 1 (1999) ..... *passim*

United States v. *Perkins*, 161 F.3d 66 (D.C. Cir. 1998) .. 3

TABLE OF AUTHORITIES — Continued

Page

Yates v. *United States*, 354 U.S. 298 (1957) 1, 2, 3

Statute

18 U.S.C. § 1001 9

REPLY BRIEF FOR PETITIONER

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE SPLIT OF AUTHORITY REGARDING THE APPLICABILITY OF THIS COURT'S DECISION IN *YATES* TO HARMLESS-ERROR REVIEW.

1. The government nowhere denies that petitioner is currently imprisoned for committing crimes—at least those alleged in Count 32 of the indictment—without the benefit of any judicial determination that he actually committed those crimes and that the *same* alleged falsehoods were false, material, and made with the requisite criminal intent to defraud. See Pet. 16-17. Indeed, until the Solicitor General filed his brief in this Court, no prosecutor had even ventured to argue that the government's evidence of all of the elements of the indicted fraud crimes, including falsity, materiality, and intent, was overwhelming with respect to a single one of the falsehoods alleged in any count of the indictment. The government makes a half-hearted defense of the decision below despite its bizarre and untenable consequences, but devotes most of its space to attempting to create the impression that the question presented is not ripe for this Court's review. Both efforts fail.

2. The government does not take issue with the principle set forth by this Court's decision in *Yates* and reaffirmed subsequent cases (see Pet. 12-13), that reversal is required when a legal error infects "one ground" for conviction, "but not * * * another, and it is impossible to tell which ground the jury selected." 354 U.S. at 312. The government also does not dispute (i) that each fraud count of the indictment alleged multiple falsehoods, any of which could have served as the ground for the jury's verdict; (ii) that the district court's error (failure to instruct the jury on the materiality element of the alleged crimes) rendered each possible ground for petitioner's fraud convictions legally defective; (iii) that the government's argument below that it

had presented overwhelming evidence of the materiality of some, but not all, of petitioner's alleged falsehoods showed at most that the district court's legal error was harmless with respect to some, but not all, possible grounds for conviction; and (iv) that the other possible grounds for petitioner's convictions remain legally defective "and it is impossible to tell which ground the jury selected." *Ibid.* The government offers no persuasive justification for the unexplained holding below that the *Yates* principle, which would otherwise require reversal here, simply does not apply to harmless-error review. See Pet. App. 13a n.7.

The government emphasizes (at 11) that when this Court in *Yates* rejected the government's argument that the trial court's error there was "harmless" (354 U.S. at 311), *Chapman* had not yet been decided. It is impossible to see the significance of this fact. Since *Chapman*, this Court has reaffirmed the *Yates* principle in *Griffin* and other cases. See Pet. 12-13. The government also suggests (at 11-12) no possible basis for its odd proposed refinement of the Eleventh Circuit's holding, which would apparently exempt from the *Yates* rule only those cases, like this one, where the government tries to show harmless error on the basis of overwhelming evidence, but not cases, like *Yates* or *Keating*, where the government's harmless-error argument rests on some other theory.[1]

---

[1] *Keating* thus cannot be distinguished, as the government supposes (at 11 n.4), on the basis of the government's particular theory of harmlessness in that case. The government's choice of harmless-error argument had nothing at all to do with the court's holding: that *Yates* required rejection of the government's harmless-error claim when the government failed to show that the district court's error was harmless with respect to each possible ground for conviction. See 191 F.3d at 1062. As the government concedes (at 11 n.4), the *Keating* court held that the government had failed to show harmlessness "under any of the possible approaches." 191 F.3d at 1064 n.7. The government also cannot

Petitioner does not, of course, dispute that the court below was required to apply this Court's previous decision in *Neder*, and to inquire, following the *Chapman* harmless-error standard, whether the jury's "verdict would have been the same absent the [district court's] error." *Neder*, 527 U.S. at 17. Petitioner, like the government, also perceives no tension between this Court's holding in *Neder* and *Yates*. The question presented is whether the court of appeals correctly held that the *Yates* rule does not apply to harmless-error analysis. The decision below obviously is not, as the government claims (at 12), the first to address this issue. To the contrary, the Eleventh Circuit's decision irreconcilably conflicts with decisions of numerous other courts of appeals, which have agreed that harmless-error review is "guided by" *Yates*. *Hastings*, 134 F.3d at 242; see also, *e.g.*, *Keating*, 191 F.3d at 1062-64; *Perkins*, 161 F.3d at 74-75; *Ienco*, 92 F.3d at 570.

3. The government also attempts, through a series of specious arguments, to dissuade this Court from granting review because, according to the government, even a reversal would be of no consequence. The government's reading (at 9) of the opinion below as holding that the government's evidence of materiality was overwhelming with respect to *every* one of petitioner's alleged falsehoods (aside from those relevant to Count 32) is belied by the court of appeals' own determination that it was not required to make any such finding (see Pet. App. 13a & n.7) and the government's failure even to argue below that it had put on overwhelming

---

distinguish (at 12 n.5) *Ienco* on the basis of an interim change in the law that has no bearing on the Seventh Circuit's holding that reversal was required when the government had failed to show that the district court's error was harmless with respect each possible ground for conviction. See 92 F.3d at 570. There can be no serious doubt that both Judge Reinhardt in *Keating* and Chief Judge Posner in *Ienco* would have reached a different outcome from that reached by the Eleventh Circuit in this case.

evidence of the materiality of several entire categories of alleged falsehoods. See Pet. 11 n.2. More fundamentally, however, even if the question presented were only relevant to Count 32—which it is not—that would be no reason for declining to resolve the important and far-reaching issues presented by this case.

The government first proposes (at 9) that petitioner's claims depend on the "highly unlikely premise" that the jury relied on only one of five misrepresentations when it convicted petitioner on Count 32. The government thus would have the Court deny review based on the nonsensical suggestion that the court of appeals, on remand following a decision in petitioner's favor, would ignore the governing *Chapman* standard and would apply a novel harmless-error test, affirming petitioner's conviction on Count 32 with a finding that it is "highly unlikely" that the conviction rests on legally improper grounds.

The government also argues (at 13-14)—for the first time in its brief to this Court—that with respect to three of the five possible theories of conviction for Count 32, the evidence of falsity, materiality, and intent was all overwhelming. This argument, if not waived, would properly be addressed to the court of appeals on remand, not this Court. See *Neder*, 527 U.S. at 19 (remanding to court of appeals for harmless-error determination). And, in any event, the government's argument that its evidence of falsity and intent was overwhelming is implausible in the extreme, squarely contradicting the government's previous concessions that petitioner's primary defense before the jury was that he lacked the intent to defraud, and that petitioner presented extensive supporting evidence to demonstrate, among other things, his good faith reliance on the advice of counsel. See Br. for U.S., No. 97-1985, at 4-5 (petitioner "contest[ed] the falsity of his statements to the lenders, and * * * contend[ed] that he relied in good faith on the advice of his attorney and

lacked an intent to defraud"); Govt. C.A. Supp. Br. 8, 26 (agreeing that petitioner's defenses were "lack of intent to defraud," "lack of falsity," and "good faith reliance on advice of counsel," and noting testimony in petitioner's favor); Govt. C.A. Supp. Reply Br. 4 ("Neder's trial strategy was to show that he lawfully conducted all the affairs of his real estate business in good faith reliance on advice of counsel").[2]

Finally, the government is simply wrong to claim (at 14-15) that a challenge limited to Count 32 is moot because a reversal of that conviction would not, according to the government, change Neder's sentence. In *Carmell* v. *Texas*, 120 S. Ct. 1620, 1626 (2000), for instance, this Court granted review and reversed four of a criminal defendant's fifteen convictions, even though he was already serving life sentences for two of the other convictions, which were uncontested in this Court. Indeed, it is well established that a criminal conviction may be challenged even after the defendant has completed his entire sentence. See *Sibron* v. *New York*, 392 U.S. 40, 53-58 (1968).

---

[2] The government's argument evokes Chief Justice Rehnquist's cautionary note in the Court's earlier opinion in this case. Responding to concerns that a defendant could be convicted even if *none* of the necessary elements were found by a jury, the Chief Justice explained, "[h]appily, our course of constitutional adjudication has not been characterized by this 'in for a penny, in for a pound' approach." 527 U.S. at 17 n.2. But that is exactly what the government hopes to accomplish here. Forced to acknowledge that the district court's error invalidated petitioner's conviction based on one set of facts alleged in Count 32 (that petitioner falsely stated he had made a down payment, see U.S. Br. 5-6), the government proposes that the court of appeals can affirm the conviction by finding overwhelming evidence of *all* of the elements of the crime based on different alleged facts pertaining to a different claimed falsehood.

II. THE COURT SHOULD GRANT THE PETITION IN ORDER TO ELIMINATE THE SPLIT AMONG THE CIRCUITS OVER THE MEANING OF MATERIALITY IN THE FEDERAL LAW OF FRAUD.

1. The government's argument regarding whether a victim's participation in an allegedly fraudulent transaction with knowledge that a statement is false is relevant to determining whether the false statement was material fails to address either petitioner's arguments or the existing split among the circuits. Instead of demonstrating that there is no split over the meaning of materiality in federal fraud law, the government mischaracterizes petitioner's arguments and the holding below, attempts to narrow the holding of *Kungys*, and *embraces* the existing split by relying on one test for materiality rather than the definition of materiality that the test is designed to satisfy.

2. Throughout its brief, the government mischaracterizes petitioner's arguments. The very first sentence of the government's argument on this point states (at 15) "[w]ith respect to his convictions on the land development charges, petitioner claims (Pet. 18-26) that the court of appeals erred in concluding that a false statement can be 'material' even though the recipient of the statement knows it is false."[3] But petitioner has never suggested that a false statement *cannot* be material if the victim knows it is false; rather petitioner's argument is that the victim's willingness to take part in the allegedly fraudulent transaction

---

[3] The government is also mistaken that petitioner has made this claim only with regard to the "land development fraud" convictions. The court of appeals' error infects all of petitioner's mail, wire, and bank fraud convictions, and consequently the conspiracy, racketeering, and conspiracy to commit racketeering convictions based upon mail, wire, and bank fraud. See Pet. 6; Neder C.A. Supp. Br. 35-37.

with knowledge that the statement is false is *relevant* to determining whether the statement is material. See Pet. 19-22. The court of appeals ruled petitioner's evidence that his alleged victims were aware of the supposed falsity of his statements had no bearing *at all* on the question of materiality. See Pet. App. 15a. It may be easier for the government if petitioner were to make such an absolute argument about victim knowledge, but it is the Eleventh Circuit's ruling, and the government's defense of that ruling, that takes the absolute position.

Viewed with a proper understanding of the government's proposed rule—that a victim's willingness to take part in an allegedly fraudulent transaction after leaning the truth behind a false statement is *irrelevant* to determining whether that statement is material—the arguments and authorities offered by the government in support of that rule are no support at all. Mischaracterizing the question, the government (at 15) cites authority having to do with the effect of "collateral circumstances" and, in a desperate attempt to avoid making a clear statement of the Eleventh Circuit's facially erroneous rule, the government cites cases it claims hold that a victim's knowledge of a statement's falsity "is *usually* not relevant" and "*generally* does not make the statement any less material" (emphasis added). Of course, this weaker formulation of the rule does not accurately reflect what the Eleventh Circuit held below: that a victim's willingness to engage in a transaction even with knowledge of a statement's falsehood can *never* be used to show that the statement is immaterial.

3. The government's attempt (at 16) to limit the *Kungys* standard of materiality (which asks "what would have ensued from * * * knowledge of the misrepresented fact,"*Kungys*, 485 U.S. at 775 (plurality opinion)) to statements "revealing the falsity of an earlier statement" is unavailing. The government offers absolutely no reason,

much less a principled reason, why the materiality standard established in *Kungys* applies only to the particular *form* of the falsehoods made in *Kungys*. This Court has never made such a distinction; indeed, this Court cited the *Kungys* materiality standard *in this case*. *Neder*, 527 U.S. at 16.

Faced with the clear holding of *Kungys*, the government again avoids confronting the issue squarely by mischaracterizing petitioner's argument. The government claims (at 16) that petitioner seeks a standard of materiality that would rely on "hindsight" or a test that would require that a falsehood would "more likely than not" lead a victim to engage in a fraudulent transaction. But petitioner introduced evidence to show that his alleged victims knew the truth underlying his alleged falsehoods *before* they engaged in the transactions at issue. See *infra* 9-10; Pet. 6, 18; Pet. App. 15a, 19a, 21a. The "more likely than not" standard attacked by the government is a straw man; petitioner has never sought such a standard.

4. Unable to deny the split in the courts of appeals on this question, the government *embraces* the split, arguing (at 17) that, because the securities statutes "involve * * * a different theory of harm," "materiality takes on a different meaning" in those statutes than it does in the mail, wire, and bank fraud statutes. The government offers no explanation of what is different about the "theory of harm" addressed by the securities laws, nor can it. Both sets of laws protect against the same type of harm: the making of a material false statement (or a material omission) that induces someone to enter into a fraudulent transaction.

Instead, the government stands *Basic Inc.* v. *Levinson* on its head, co-opting the *Basic* test for materiality in fraud-on-the-market cases—that a statement "significantly altered the 'total mix' of information available," 485 U.S. at 232—for the government's effort to redefine the meaning of materiality in securities fraud cases. But *Basic* does not

establish a separate definition of materiality in securities cases; the *Basic* test is simply a way of applying the concept of materiality to a context in which many of the victims would never have heard the false statement in question. Far from divorcing materiality in securities fraud cases from materiality in other fraud cases, *Basic* simply establishes a presumption—that a statement made to a market instead of an individual affects individuals in the same way as if the statement were made to them personally. See *Basic*, 485 U.S. at 245-49 (cited in *Kungys*, 485 U.S. at 777).

5. Also unavailing is the government's weak attempt to argue away the split among the circuits on this issue. The government pretends that the First Circuit and the Ninth Circuit, which have both come down squarely against the Eleventh Circuit holding in this case (Pet. at 19-20), agree with the Eleventh Circuit's ruling in the context of criminal fraud. But the cases the government cites (at 15, 18) establish no such thing. Neither of the cases addresses the relevance of the fact that an alleged victim entered into a transaction after knowing the statement in question was false. *Goldfine*, a case for which the government reached back almost twenty-five years, involved a conviction under 18 U.S.C. § 1001 for making false statements to customs agents even though the agents knew the underlying truth. The Ninth Circuit found that, even though the statement could not have prompted reliance by the customs agents because they knew the truth, it was still a violation of § 1001. 538 F.2d at 820-21. But, unlike the loan officers and other alleged victims in this case, the customs agents in *Goldfine refused* to participate in the fraudulently induced transaction after they knew the truth. *Goldfine* is completely inapposite because Goldfine, unlike petitioner, did not offer the willing participation of the correctly informed customs agents as evidence that his falsehoods were immaterial. What petitioner attempted to show below, and what the Eleventh Circuit ruled was

irrelevant, was that even after his alleged victims knew the truth behind his allegedly false statements, they were *willing* to enter into the transactions for which he was charged. The government's other case, *Corsino*, does not address victim knowledge at all, much less an alleged victim's willingness to enter into a transaction after learning the truth behind a false statement. See 812 F.2d at 29-31. *Corsino* thus furthers neither the government's argument (at 15) that the Eleventh Circuit ruled correctly nor the government's ineffective attempt (at 18) to argue away the circuit split on this issue. The government failed entirely to address the split between the Eleventh and Fourth Circuits. See Pet. 20.

The government cannot defend the Eleventh Circuit's patently erroneous ruling by attempting to recast the decision, mischaracterizing the petitioner's position as more extreme than it is, and relying on court decisions having nothing to do with victim knowledge in the context of fraud. The court of appeals' ruling is indefensible, and it contributes to an existing circuit split over the meaning of materiality in the federal law of fraud.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL G. LAWRENCE
Law Offices of
Noel G. Lawrence, P.A.
100 Riverside Avenue
Jacksonville, Florida 32202
(904) 733-1237

JAVIER H. RUBINSTEIN
Counsel of Record
KASPAR J. STOFFELMAYR
THOMAS B. NACHBAR
KARNIG KERKONIAN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

JUNE 2000